JD–15–98
Irvine, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FLUOR DANIEL, INC.

and

Cases 28–CA–12750
28–CA–13357

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 995, AFL-CIO

Cases 15–CA–12938
15–CA–12723
15–CA–12852
15–CA–12936

and

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PLUMBERS & STEAMFITTERS LOCAL UNION NO. 198, AFL-CIO

Cases 15–CA–12544
15–CA–12666

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DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. This consolidated case involves allegations of unfair labor practices against Fluor Daniel, Inc., Respondent herein. Respondent is one of the largest, if not the largest, general contractors in the world. This case involves allegations of failure and refusals to hire over 100 union affiliated applicants for employment because of their union affiliation at two separate and distinct projects, i.e., the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, where Respondent had a service and maintenance contract, and Exxon's refinery in Baton Rouge, Louisiana where Respondent was rebuilding Exxon's East Coker plant after it was destroyed by fire.

The case began with the filing of charges against Respondent by the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198. The Boilermakers International Union filed its charge and two amended charges in Region 28 in Phoenix, Arizona.[1] IBEW Local 995 and Pipefitters Local 198 filed charges and amended charges in Region 15 in New Orleans, Louisiana.[2]

On April 17, 1995 the National Labor Relations Board, by the Regional Director for Region 28, issued an amended complaint and on March 29, 1995 the National Labor Relations Board, by the Regional Director for Region 15, issued an amended complaint. Both amended complaints allege that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act.

On April 12, 1995 the General Counsel in Washington, D.C. had ordered that the complaints issued against Respondent in Region 28 and Region 15 be consolidated for trial.

Respondent had previously filed answers to the two amended complaints in which it denied that it violated the Act in any way.

Fifty one (51) days of hearings were held before me between August 1, 1995 and December 12, 1996. The hearings were held in Phoenix, Arizona and Baton Rouge, Louisiana. Shortly after the hearing opened in Phoenix in August, 1995 the Boilermakers International Union filed an additional charge with Region 28 in Phoenix, Arizona which charge led the Regional Director for Region 28 to issue a complaint which I ordered consolidated for trial with

[1] Case 28–CA–12750.

[2] Cases 15–CA–12938, 15–CA–12723, 15–CA–12852, 15–CA–12936, 15–CA–12544 and 15–CA–12666.

the two amended complaints previously consolidated by the General Counsel.[3]

The consolidated complaints will be hereinafter referred to simply as the complaint. There are two other reported cases involving Respondent, i.e., *Fluor Daniel, Inc.,* 304 NLRB 170 (1991), *enforced without opinion*, 976 F.2d 744 (11th Cir. 1992) and *Fluor Daniel, Inc.,* 311 NLRB 498 (1993), *enforced in part and remanded in part*, 102 F.3d 818 (6th Cir. 1996). These two reported cases were referred to in this litigation as *Fluor Daniel I and Fluor Daniel II,* respectively. I was the Administrative Law Judge who presided in *Fluor Daniel II*.

Upon the entire record in this case, to include post hearing briefs submitted on August 14, 1997 by the General Counsel, Respondent, Charging Party Boilermakers, and Charging Party Pipefitters Local 198 and, upon my observation of the witnesses and their demeanor, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent admits that it meets the Board's jurisdictional standards at its job sites at the Palo Verde Nuclear Generating Station in Arizona and at Exxon's East Coker plant in Louisiana.

Respondent further admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

Respondent admits, and I find, that the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Introduction

Fluor Corporation, which is listed on the New York Stock Exchange, is the holding company for three subsidiary companies. The three companies are Fluor Daniel, Inc. (Respondent), Fluor Constructors International, Inc., herein Fluor Constructors, and AT Masey. Respondent is an open shop constructor, i.e., its employees are not organized and Respondent operates without a union contract.

Fluor Constructors is the union side of Fluor Corporation's empire. It is relatively small compared to Fluor Corporation's non-union or open shop side, i.e., the Respondent herein.

Fluor Corporation, the parent, started up in the early 1900's in southern California. It was engineering oriented and its construction work was done by Fluor Constructors, Inc.,

[3] Case 28–CA–13357.

which became quite unionized and is now the union side of Fluor Corporation and is now known, not as Fluor Constructors, Inc., but as Fluor Constructors International, Inc.

Daniel Construction was a non union or open shop general construction contractor and Fluor Corporation purchased it in the late 1970's and created Fluor Daniel, Inc., Respondent herein, some years later.

Traditionally Respondent, like most construction contractors, would go from job to job, i.e., it finishes one job and moves on to the next one and hires, quite often, craftsmen who had worked for it on prior projects. The supervisors and superintendents on various projects over the years had followings, that is, craftsmen who worked for them in the past and these people were often hired on new projects.

As time passed and Respondent got bigger and bigger it decided to establish a craft certification program. In time the certification program evolved into a written test, or in the case of welders a hands on demonstration of ability, and an evaluation of job performance after a period of time, usually 30 days. If the employee received a high enough score on the written test or demonstration, if a welder, and a high enough rating on his or her performance rating that person would become certified in a particular craft. It was also possible for a person to be certified in more than one craft.

In this case we are dealing with allegations that Respondent unlawfully failed to consider for hire and unlawfully failed to hire applicants for employment because the applicants for employment were affiliated with a union.

Respondent can chose a number of different ways to staff a job or project, e.g., what it refers to as "construction management" where Respondent serves as a general contractor and subcontracts the work to subcontractors who may or may not be open shop. The labor posture chosen by Respondent for the two projects involved in this litigation was "self perform open shop," i.e., Respondent would hire the employees to staff the project and would remain unaffiliated with any union.

Respondent had a hiring priority which it applied nationwide (if not worldwide) and which it applied on the two projects involved in this litigation.

That hiring priority was as follows: Respondent would initially hire Fluor Daniel certified applicants and then applicants with Fluor Daniel experience and lastly all others. This was the hiring priority at Palo Verde but it was slightly modified at the Exxon project where Respondent claimed it gave priority to Louisiana residents within each of the hiring priorities.

The rationale for this hiring priority is, of course, the not unreasonable desire of an employer to hire as its employees people who have worked for it in the past and proven themselves to be competent and reliable workers. On its face such a hiring priority is not unlawful because it is discrimination on the basis of competence and reliability and not discrimination based on race, gender, religion, or union affiliation. In practice it may put long time union members at a disadvantage because there is probably a good chance that they worked for union contractors in the past and not for non union contractors such as Respondent and would, as a result, not be either Fluor Daniel certified or Fluor Daniel experienced. A person could not become certified unless first hired as an employee so if a person was never hired by Respondent they would never become Fluor Daniel certified.

Fluor Corporation is the holding company for both Fluor Daniel, Inc., Respondent herein,

and Fluor Constructors, Fluor Corporation's union arm. Even though both Respondent and Fluor Constructors are under the umbrella of Fluor Corporation experience as an employee of Fluor Constructors, which is union, does not result in a job applicant for a job with Respondent getting any type of hiring preference whatsoever.

I do not find on the basis of the record before me that Respondent's hiring practice per se is violative of the Act.

However, the record as a whole developed over 51 days of hearings, the testimony of over 100 witnesses, and thousands of pages of exhibits clearly establishes that Respondent at both job sites in this litigation discriminated unlawfully against applicants for employment because of their union affiliation.

I will address each of the two job sites separately.

At the outset I note that an employer violates Section 8(a)(1) and 8(a)(3) of the Act when it discriminates against an employee with regard to his or her tenure of employment to discourage union support or otherwise interfere with protected concerted activity. The Supreme Court has held that the Act protects applicants for employment as well as employees. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941). Accordingly, the refusal to consider an application for employment for reasons prohibited by the Act is a violation of Section 8(a)(3) of the Act. *Starcon, Inc.,* 323 NLRB No. 168 (1997); *DSE Concrete Forms, Inc.,* 303 NLRB 890, 896 & n. 3 (1991), *enf'd*, 21 F.3d 1109 (5th Cir. 1994); *Shawnee Industries*, 140 NLRB 1451, 1453 (1963).

In reaching the conclusions I reach I have considered and applied the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied, 455 US 989 (1982) but have also been mindful of the Sixth Circuit decision in *Fluor Daniel II,* supra.

This case may be referred to as a "salting" case. "Salting" is the word used to describe a situation where union affiliated applicants for employment seek jobs with nonunion employers in order to organize the job or employer from within.

The Exxon project in Baton Rouge is a classic "salting" case but the situation at the Palo Verde Nuclear Generating Station in Arizona is a "salting" case with a wrinkle because with one exception (paid union organizer Gary Evenson) all the applicants for jobs at Palo Verde had worked at Palo Verde in the same jobs they were applying for with Respondent. They had worked for Bechtel Corporation which had the service and maintenance contract at Palo Verde before Respondent got it in June 1994.

The organizing effort of the Boilermakers is called their "Fight Back" program and the organizing effort of the electricians is called COMET. COMET, an acronym, stands for construction, organizing, membership, education, and training.

"Fight Back" and "Comet" both seek to organize non-union contractors in order to secure better wages and benefits for union members on the theory that non union contractors will not be able to underbid union contractors because they pay less in wages and benefits if

all contractors are organized and paying good wages and furnishing good benefits to their employees.

B. Palo Verde Nuclear Generating Station (Palo Verde), Wintersburg, Arizona

For many years Bechtel Corporation, which is a heavily unionized employer and one of the largest general contractors and engineering firms in the world, had a service and maintenance contract with Arizona Public Service covering the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, which is some 55 miles or so or a one hour car ride from Phoenix.

In connection with its obligations under the contract Bechtel Corporation provided a core group of craftsmen who worked full time at Palo Verde and also provided large numbers of craftsmen for periodic power outages at Palo Verde where extensive service and maintenance work would be done.

In 1994 Arizona Public Service put out bids with respect to the renewal of the contract to provide the service and maintenance work provided up to then by Bechtel Corporation. Respondent underbid Bechtel Corporation and got the service and maintenance contract. It was a three (3) year contract with work to commence in the summer of 1994. Between June 1994 and February 1996, Respondent had hired 962 people out of the 1281 who had applied to do the work required under the contract.

During the time that Bechtel had the contract craftsmen from the following unions worked for Bechtel at Palo Verde, i.e., Boilermakers Local 627, Millwright Local 1914, Electricians Local 640, Ironworkers Local 75, Asbestos and Insulators Local 73, Cement Masons Local 394, and Carpenters Local 408.

Ron Green, President of Power for Respondent and the highest ranking corporate official to appear as a witness, testified that Respondent bid the job with Arizona Public Service believing it could do periodic power outages quicker than Bechtel and with less people but testified further that Respondent was not in any way critical of the work performed by the craftsmen who worked for Bechtel and, indeed, it was Respondent's desire formally expressed to Arizona Public Service to identify and hire those former employees of Bechtel who were outstanding workers.

It is with this back drop that in June 1994, 52 union affiliated applicants for employment apply for work with Respondent but are <u>not</u> hired and an additional 26 union affiliated applicants for employment are not even given the opportunity to apply for employment.

The people who applied and those who tried to apply on June 27, 1994, but were not allowed to, all possessed skills that were needed by Respondent and applied for jobs which Respondent later hired literally hundreds of other applicants. With the sole exception of Boilermakers paid union organizer Gary Evenson, all of these 78 applicants had worked for Bechtel at Palo Verde and had previously secured the high security clearances necessary to work at a nuclear power plant and had taken numerous courses and received extensive training from Arizona Public Service which was necessary in order to competently perform the important and sometimes highly dangerous work needed at a nuclear facility.

As noted earlier from the time Respondent took over the service and maintenance contract from Bechtel in June 1994 until February December 1996 Respondent hired 962 out of the 1281 applicants for employment at Palo Verde and, indeed, hired fully 300 people in January 1995 for the first major power outage.

In early June 1994 representatives of the construction trade unions met in Phoenix and decided to undertake the task of having union affiliated applicants for employment apply to work for Respondent at Palo Verde. Essentially the representatives of various unions would call their members who were former Bechtel workers and had actually worked at Palo Verde and inquire if they wanted to apply for work. The union official in charge of this effort was Gary Evenson, a highly qualified boilermaker and full time paid union organizer for the Boilermakers International Union.

On several days in June 1994 groups of craftsmen would meet at the Boilermakers Union Hall in Phoenix where Evenson would ask if they wanted to apply for work with Respondent at Palo Verde and would indeed accept employment if offered. They were instructed to write "voluntary union organizer," or words to that effect, on their applications and not to bother applying for work unless they were interested in taking the job, doing a good job for Respondent, and willing to try to organize Respondent.

I find that the applicants were bona fide applicants for employment. See, e.g. *Town & Country Electric, Inc.,* 116 S. Ct. 450 (1995). I note that they were applying for work at a site where they had worked before and they lived in the general area of Palo Verde, namely, Phoenix and its suburbs.

On each of several days in June 1994, a group would then leave Phoenix after receiving Evenson's orientation and meet up again at a grocery store called the Red Quail near the Palo Verde site and then proceed as a group to Respondent's trailer where they would apply or try to apply for work.

On June 16, 1994 the first group of 19 men went to Respondent's trailer. Rather than all go in at once Gary Evenson and Mark Smith entered first and were given applications to fill out. Interestingly enough Mark Smith, a boilermaker, had been told on June 14, 1994 to come back the next day to apply. He did and was told by a representative of Respondent, Leonard Wallace, that Respondent was going to need welders and soon. Boilermakers do welding work. Smith had given no indication that he was union affiliated on June 14 and June 15, 1994. Evenson and Smith likewise were not manifesting in any way that they were union affiliated on June 16, 1994. They filled out their applications and a short while later the rest of the group entered. All were wearing union buttons and hats and Evenson and Smith then displayed union buttons and hats. The rest of the group were allowed to fill out applications. It is clear Respondent knew the applicants were union affiliated.

They were as follows:

<u>16 Boilermakers</u>

1. Chester Arthur
2. William Deen
3. Francisco Diaz
4. Jerry Dillon
5. Wayne Fern
6. Michael Harvey

7. Robert Logue
8. Don Mourney
9. Vern Price
10. William Quallis
11. Curtis Veich
12. Larry Voorhees
13. Ernie Wilden
14. Leslie Dixon
15. Ira Sexton
16. Gary Evenson

2 Ironworkers

1. Jim Lehmann
2. Martin Murphy

1 Insulator

1. Frank Naccarato

All filled out applications. None were hired. All except Gary Evenson had worked for Bechtel at Palo Verde and had secured high security clearances and received extensive training given by Arizona Public Service. Evenson, a highly experienced boilermaker with 35,000 hours of experience, had not previously been employed by Respondent. Each application on its face said it was good for 60 days.

On June 20, 1994 a second group of union affiliated applicants consisting of 15 men went to Respondent's trailer and filled out applications. They were as follows:

12 Millwrights

1. Peter Apostoles
2. Melvin Boyd
3. Frank Cody
4. John Cooper
5. Joe Hammons
6. Peter Kornmuller
7. Lloyd Landers
8. Michael McQuarrie
9. Wylie Miller
10. Roger Stone
11. Frank Troester
12. Michael Valdez

1 Ironworker

1. Lance Mendel

2 Boilermakers

1. Gary Clark
2. Rudy Pariga

All of the men who applied on June 20, 1994 had worked for Bechtel at Palo Verde, had security clearances, and had received extensive training from Arizona Public Service. None were hired.

On June 21, 1994 two union affiliated men applied at Respondent's trailer for work. They were as follows:

2 Boilermakers

1. John Allen
2. Gary Sly

Again these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

On June 23, 1994 a group of 16 union affiliated men applied at Respondent's trailer for work. They were as follows:

9 Millwrights

1. Lee Braudt
2. Gary Brinlee
3. Albert Charter
4. Jack Martyn
5. William Miles, Jr.
6. William Oviedo
7. John Spiller
8. Michael Swarthout
9. Richard Valdez

3 Ironworkers

1. Tony Allen, Sr.
2. Mel Brubaker
3. Floyd Smith

1 Boilermaker

1. James Begay

2 Insulators

1. Michael Bradley
2. Ed Martinez

1 Electrician

1. John Starkel

Again all these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

The applications of all of the above 52 union affiliated applicants had a statement on the application which stated the application form would expire in 60 days after they were submitted or for these applicants in mid to late August 1994.

The applications submitted by the above 52 applicants for employment for the most part indicated on the face of the applications that the applicants were "Voluntary Union Organizers" and, in any event, it was crystal clear to Respondent's representatives who accepted the applicants that these applicants were union affiliated. Respondent does not contend that it did not know that these applicants were affiliated with a union. Again, none were offered employment.

Most of the above 52 discriminatees testified and for the few who did not we have their applications in evidence. All those who testified were exceedingly truthful and all 52, without exception, were qualified to work at Palo Verde. Literally hundreds of people were later hired by Respondent to do work these union affiliated applicants wanted to do and were exceedingly well qualified to do. And even with Respodnent's hiring preference fully 45% of the craftsmen hired at Palo Verde had no prior experience with Respondent.

On June 27, 1994 a group of approximately 26 union affiliated applicants arrived at Respondent's trailer to apply for work. They were as follows:

<u>10 Insulators</u>

1. James Arias
2. Abondio Cabrera
3. Robert Cabrera
4. Curtis Case
5. James Cruill
6. William Howlier
7. Mark Kasdorf
8. Dennis Moya
9. Kelvin Patton
10. Jose Sanchez

<u>3 Boilermakers</u>

1. Michael Goodman
2. Mike Leslie
3. Joseph Wood

3 Carpenters

1. Francis Chaney
2. Don Shoemaker
3. Johnny Tyler, Jr.

3 Ironworkers

1. Linda Hayes
2. Steven Padilla
3. Ron Richards

2 Millwrights

1. Clyde Hafeli
2. Ken Hayes

2 Cement Masons

1. Waymond Parker
2. Charles Walsh

1 Sprinkler Fitter

1. John Rahn

2 Painters

1. Greg Stroud
2. Julio Garcia

June 27, 1994 was a Monday and the group of applicants, who had all worked for Bechtel at Palo Verde and had security clearances and extensive training were told by Dean Hamrick, a supervisor for Respondent, that Respondent was not accepting applications. They left.

A charge was filed over the failure and refusal of Respondent to consider these applicants for employment and Respondent responded to the charge with a position letter which inaccurately stated that Respondent had accepted no applications between June 24 and June 28, 1994.

With respect to what occurred on June 27, 1994 Respondent clearly violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment the union affiliated applicants. Hamrick admits that he knew that the persons who sought to apply for jobs on June 27, 1994 and were led by Gary Evenson were union people. Respondent never told anyone in the group to come back the next day and apply and most significantly Respondent was accepting applications on June 27, 1994. Indeed, no less than 55 people submitted applications on June 27, 1994 and were hired and Respondent accepted 5 more applications on June 28, 1994 and hired the applicants and 8 applications on June 29, 1994 and hired the applicants. Most of these applicants who were hired were former employees of Respondent but not all of them.

Going to Respondent's trailer was not like going next door or across town to file an

application where it would be fairly easy to come back the next day. Respondent's trailer, where it accepted applications, was out in the desert some 55 miles from Phoenix.

With respect to boilermaker Joseph Wood, I note that a week or so earlier he had asked his mother, who worked for Arizona Public Service at Palo Verde, to get him an application to apply for work for Respondent. She did. He filled it out and gave it to his mother to turn in. Wood's mother, Catherine Ray, who testified before me, handed in the application at Respondent's trailer to a young woman prior to June 27, 1994. On the application Wood had written that he was a "voluntary union organizer." Not only was Wood never called but Respondent claims it did not even have his application as having been received.

All 26 of the people who tried to apply for work with Respondent on June 27, 1994 had worked for Bechtel at Palo Verde and had skills actually needed by Respondent at Palo Verde and other people were hired in their place to do what they were qualified to do and what they had actually done at that very site while working for Bechtel.

Most of the 26 would be applicants testified and impressed me as highly credible and competent craftsmen.

On July 28, 1995, a little more than a year after Respondent began its operations under the service and maintenance contract at Palo Verde union boilermaker Mark Winham, who had worked for Bechtel at Palo Verde, called Respondent's office to seek employment. He asked to speak to Mike Owen, who Gary Evenson had told him was doing the hiring. A woman who answered Respondent's phone said Mike Owen was busy at the moment but told Winham that Respondent was looking for welders, which is the type of work performed by boilermakers. Owen was a craft recruiter at the time for Respondent.

Later that very day Mark Winham spoke on the phone with Mike Owen and after Winham told Owen that he (Winham) was a union boilermaker, had worked at Palo Verde before, and wanted to hire on and organize a little bit for the union Owen tells Winham that Respondent really didn't need anyone right then but that Winham should give Owen his name and he'll call him when they need welders. Needless to say Owen never called Winham.

Curiously enough Danny Garnica had spoken with Mike Owen just the day before and Owen told boilermaker Garnica, who did not identify himself as union affiliated, to come out and fill out an application for a welder position. Owen admits he didn't know Garnica was with the Union.

In other words, Owen, not knowing Garnica is union affiliated, says to him over the phone to come out and fill out an application for a welder position but tells Winham, who tells Owen he is union affiliated, that Respondent doesn't need welders right then and not to come out and apply even though a woman in Respondent's office earlier that very day had told Winham that Respondent needed welders. Both Garnica and Winham are welders. Welders are thereafter hired. Respondent violated Section 8(a)(1) and (3) of the Act when it failed to consider for hire and failed to hire Mark Winham.

The charge in the Winham matter was filed on October 4, 1995 and a complaint in that case, 28–CA–13357, issued on November 29, 1995 and was, as noted above, consolidated with the instant case.

The trial of the instant case began on August 1, 1995 and Respondent was well aware that the June 1994 applicants for employment were alleging that they had been discriminatorily

denied employment and yet Respondent never contacted them about job openings.

I find that the people who applied for work with Respondent on June 16, 1994, June 20, 1994, June 21, 1994, June 23, 1994 and the people who tried to apply for work with Respondent on June 27, 1994 but were not allowed to were all good faith applicants for employment. With the exception of Gary Evenson, the Boilermaker's paid union organizer, all had formerly worked for Respondent's predecessor, Bechtel Corporation, at Palo Verde. There is nothing to suggest that they were anything but good faith applicants for employment and are therefore entitled to the protection of the Act.

The next inquiry must be whether there were jobs that were to be filled. In other words it can't be a violation of the law to fail to hire someone if in fact there was no opening to be filled.

In this case there were hundreds of jobs that were needed to be filled and were later filled by Respondent for which these union affiliated applicants were qualified.

At least as of the time the hearing before me closed on December 12, 1996 Respondent was hiring for periodic power outages which required work to be done which is the same work the union affiliated applicants did for Bechtel and which had to be done by Respondent. From the time Respondent began hiring craftsmen at Palo Verde in June 1994 until February 1996, Respondent had hired 962 craftsmen. There were more than enough jobs for all the discriminatees to be hired into their craft.

From June 16, 1994 until present, Respondent has known these applicants wanted jobs. They knew it from the applications filed in June 1994 and they knew it because of charges and amended charges being filed on September 19, 1994, October 27, 1994, and January 12, 1994 and they knew because of the amended complaint which issued on April 17, 1995, and they knew it from the hearing before me which began on August 1, 1995 and yet no offers of jobs have been made to these union affiliated applicants for employment. Respondent claims that it has a policy that applications remain active for 60 days but, according to Respondent, the 60 day active period rule is because after 60 days most craftsmen have found work and are no longer interested in working for Respondent but in this litigation we know the applicants were still interested in working for Respondent and Respondent knew it as well.

There is also no question about the fact that Respondent knew these applicants were union affiliated.

I find that these union affiliated applicants for employment were denied hire because of their union affiliation.

The record contains massive amounts of evidence which demonstrate anti-union animus on Respondent's part. The evidence of animus which supports the conclusion that Respondent discriminated in hiring against these union affiliated applicants for employment is as follows:

1. Prior to beginning work at Palo Verde, Respondent in May 1993 conducted a wage survey. Respondent determined to staff the job on a "direct hire open shop" basis, i.e., Respondent would directly hire applicants for employment but it noted in the wage survey what it referred to as a "risk." The greatest risk Respondent warned of was that they may pick up union craft workers primarily in the mechanical trades (See CP Exh. 93). Respondent concedes in its brief at p. 160 that "this risk was noted because it posed a potential threat to Respondent's preferred means of performing the project open-shop, as union members could conceivably seek union representation and ultimately, a collective bargaining agreement." This coupled with all the other evidence establishes by at least a preponderance of the evidence that Respondent discriminated in hiring against the union affiliated applicants for employment in this case. Respondent's argument that this did not impact on actual hiring decisions is ludicrous.

2. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for craftsmen. The rationale for a preference should be that these folks worked for us in the past and were good workers so lets hire them over someone who never worked for us. This rationale should apply to salaried engineers as well as craftsmen but since engineers are not unionized and craftsmen may be it raises a question about Respondent's motive for having a hiring preference.

3. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, Inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference if someone has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference if the person worked for Fluor Corporation's union counterpart. The inference seems clear, i.e., Respondent doesn't want to hire union craftsmen.

4. On June 14, 1994 union boilermaker Mark Smith went to Respondent's trailer at Palo Verde where people applied for work and said he wanted to apply. He was told by a representative of Respondent to come back the next day. Smith returned the next day and submitted an application. The representative of Respondent was craft recruiter Leonard Wallace who told Smith that Respondent would need welders soon. Wallace did not testify. However, Dean Hamrick, also a craft recruiter for Respondent, testified in Respondent's case that he told Gary Evenson, when Evenson and other union boilermakers went to apply on June 16, 1994, that Respondent was <u>not</u> hiring any boilermakers. Evenson and boilermaker applicants Leslie Dixon, Ernest Wilden, Michael Harvey, and Chester Arthur all credibly testified in rebuttal that no one representing Respondent said Respondent was <u>not</u> hiring boilermakers.

5. At the time that union insulator Frank Naccarato applied for work with Respondent on June 16, 1994 Respondent needed insulators. A notation was prepared by craft recruiter Dean Hamrick dated June 22, 1994 in his diary which was to remind him to ask recruiter Jim Hanna as whether Naccarato should be hired because he was "non-Fluor Daniel." Written in the diary was the word "no." Hamrick testified that he answered his own inquiry and did not speak to Hanna about Naccarato and was really inquiring about whether there was a requirement to hire applicants who identified themselves as voluntary union organizers. This is utter nonsense. Hamrick had been in human resources work for Respondent since 1982. Hamrick knew full well there was no legal obligation to hire voluntary union organizers. It appears to me Hamrick was tempted to hire Naccarato but wanted to check if it was okay because Naccarato was union and Hamrick found out that he should not hire him because of Naccarato's union affiliation.

6. On August 16, 1994 union boilermaker Steve Horlacher called out to Respondent and was told Respondent was looking for welders. This means that Respondent was ignoring

the applications it had on file from the union applicants which were submitted in mid-June 1994. Horlacher was hired. He did not note on his application that he was a voluntary union organizer and he was hired whereas those union applicants who had made known their intent to exercise their federally guaranteed right to organize were not hired.

7. Steve Horlacher filed two applications with Respondent. On June 16, 1994 there was indicia of union affiliation on his application. He was not hired. On August 16, 1994 there was no indicia of union affiliation on his application and he was hired.

8. Millard "JD" Howell is a boilermaker union organizer. He is not an alleged discriminatee in this case. On July 14, 1994 Howell called Respondent's office at Palo Verde and spoke with a women he thought identified herself as Sue. He asked if Respondent was looking for welders. She told Howell to give her his name and telephone number and she'd get back to him. Howell had told her he had worked for several different companies, all of which were non union. Howell left his mother's telephone number in Mississippi with the woman in Respondent's office at Palo Verde.

On September 12, 1994 Howell's wife told him that a woman named Marilyn had called Howell's mother and left a telephone number for him to call.

Howell called Marilyn on the telephone number given him. Marilyn, it turned out, worked for Respondent at the Wolf Creek Nuclear Station in Kansas.

Marilyn told Howell that Respondent was looking for welders and hands at Wolf Creek and Howell told her that he and another person would show up for work at Wolf Creek.

Howell went to Wolf Creek with another union boilermaker named James "Jay" Bragan. Both men were hired. On their applications at Wolf Creek Howell wrote that he was a "voluntary union organizer" and Bragan wrote that he was a "paid union organizer." Bragan testified and corroborated Howell.

The need for welders at Wolf Creek was so great that a memo was circulated among the employees at Wolf Creek that they would get a $200 reward if they recommended a welder for employment who passed the welding test and was hired and they would be paid a $300 reward if they recommended a welder who passed the test, was hired, and stayed until there was a general lay off.

This evidence is significant because Respondent never told the union applicants at Palo Verde anything about job opportunities at Wolf Creek but did get back to Howell about the opportunity for work at Wolf Creek after Howell had called Palo Verde and given a work history with only non union contractors.

9. With regard to the Wolf Creek Nuclear facility where Millard "JD" Howell and James "Jay" Bragan were hired it should be noted that Respondent did not tell any of the union affiliated applicants for employment at Palo Verde about jobs at Wolf Creek and it was stipulated in the hearing before me that there were enough job openings at Wolf Creek to hire every single one of the discriminatees in the Palo Verde portion of this litigation.

10. On September 8, 1994 union boilermaker Steve Horlacher was with foreman Harry Sinclair after work in a bar called Boondocks. The craftsmen at this time were working very hard with large amounts of overtime and, according to Horlacher, he asked Sinclair why Respondent didn't hire more of the boilermakers and other qualified crafts people who had put their applicants in. According to Horlacher, Sinclair "said that his supervisor told him that the reason why is because they put voluntary union organizer across their applications" (Tr. 292). Horlacher said "Harry isn't that discrimination?" and Sinclair just shrugged (Tr. 291-393).

Sinclair was admitted by Respondent to be an agent and supervisor of Respondent within the meaning of the Act.

Sinclair who testified before me said he was not in Respondent's employ at the time he testified before me but wants to work for Respondent in the future. Sinclair denied he said to Horlacher what Horlacher claims he said. Arguably both Horlacher and Sinclair have motives to testify as they did. I observed the demeanor of both men and I found Horlacher to be the more credible. Needless to say the statement by a foreman that Respondent won't hire applicants who write "voluntary union organizer" on their job applications is a violation of Section 8(a)(1) as well as evidence that Respondent violated Section 8(a)(3) in its failure to hire the union affiliated applicants for employment.

11. Although the former Bechtel employees for the most part lived in the Phoenix area and could commute to Palo Verde Respondent had to incur more cost by paying per diem to out of state craftsmen to work at Palo Verde. In order to avoid hiring these union affiliated applicants Respondent was willing to incur the extra expense of per diem.

12. On August 18, 1994 Don Koza, a craft recruiter for Respondent, told union boilermaker Steve Horlacher that Respondent needed jumpers and welders. Horlacher knew that this was the kind of work that union boilermakers did and he gave Koza the phone number of Gary Evenson to call to get referrals of people who could do the work Koza told Horlacher Respondent needed people to do. Koza never called Evenson.

13. Even though we were in trial on Respondent's alleged failure to hire union applicants who applied in June 1994 Charging Party Exhs. 27, 28 and 29, i.e., Respondent memos of September 5, 1995, November 16, 1995 and December 5, 1995 reflect that Respondent was short on welders and fitters and was having trouble meeting its staffing needs at Palo Verde. And yet even though we were actually in trial on this case in September, November, and December 1995 Respondent took no action whatsoever to hire the union affiliated applicants in this litigation.

C. Exxon Project, Baton Rouge, Louisiana

Exxon operates a refinery in Baton Rouge, Louisiana. In October 1993 the East Coker plant at that refinery burned to the ground.

Respondent bid for and was awarded the contract from Exxon to rebuild the East Coker plant. Work was scheduled to begin in January 1994 and be completed by July 1994. It was anticipated by Respondent that 250 people would be needed to rebuild the East Coker plant at a cost of $50 million but Respondent wound up needing 2,800 people to do the job and it was not completed until December 1994 at a cost of approximately $100 million.

The construction trade unions in Baton Rouge decided to encourage their members to seek employment with Respondent so that they could get work for their members and try to organize this large open shop contractor.

The applicants who sought employment with Respondent were members of several different unions, i.e., IBEW Local 995, Boilermaker Local 582, Pipefitters Local 198 and Laborers Local 692. Where appropriate I will refer to the applicants as highly qualified based on the material contained in their applications in the record. The union affiliated applicants hereafter listed wore union insignia, were in a group and it is uncontested that Respondent's hiring officials knew they were union applicants.

On January 19, 1994 ten members of IBEW Local 995 applied for employment as electricians. Respondent had a sign posted in front of its hiring office proclaiming that Respondent was hiring electricians. The applicants were as follows:

1. Edwin Cooks
2. Kelly Gauthreaux
3. Roland Goetzman
4. Don Guarino
5. Mike James
6. Robert LeJeune
7. Ronnie Penny
8. Ernest Perrault
9. Steve Pritchard
10. Kendrick "Ricky" Russell

None of these highly trained electricians, eight of whom testified, were offered employment until late August 1994 when Ricky Russell and only Ricky Russell was offered a job. More on Russell later.

On January 25, 1994 four members of IBEW Local 995 applied for work. They were as follows:

1. Joe Aycock
2. Chris Bonnette
3. Jeff Bourg
4. Richard Fletcher

None of these highly qualified electricians, two of whom testified, were hired.

On January 26, 1994 five more highly qualified electricians applied for work. They were as follows:

1. Ricky Achord
2. Curtis Blount
3. Earl Long
4. Leon Parent
5. Dale Rispone

None of the five, there of whom testified, were hired.

On February 1, 1994 fifteen (15) men applied for work with Respondent. Seven of them

were members of Pipefitters Local 198 and eight of them were members of Boilermakers Local 582. Respondent was hiring ironworkers and had posted a notice that it was hiring ironworkers. The uncontradicted testimony of numerous highly skilled craftsmen proved that pipefitters, ironworkers and boilermakers could all do the work of ironworkers.

The applicants were as follows:

Pipefitters

1. Jeff Armstrong
2. William Blalock
3. Eugene Braud
4. Billy D. Braid
5. Jeffrey Burns
6. Earnest Ford (who most likely applied on February 2, 1994)
7. Jeff Mire

Boilermakers

1. James K. Bueche
2. David Greer
3. Ed Hughes
4. John Kelly
5. JJ Leveron
6. CA Lewis
7. Robert H. Redden
8. A.E. Ross

None of these highly qualified applicants, twelve of whom testified, were hired.

Interestingly enough Respondent could not locate the application of boilermaker James "Kenny" Bueche. This is most interesting because Respondent claims that it did not discriminate against union affiliated applicants but simply applied its hiring preference, i.e., it would hire Fluor Daniel certified craftsmen first and then craftsmen with Fluor Daniel experience over all others. James "Kenny" Bueche had worked for Respondent in the past and was Fluor Daniel experienced and Respondent not only did not hire him but claimed it did not even have his application.

Respondent claims it did not have an application for Pipefitter Earnest Ford and the evidence further reflects that Ford probably applied on February 2, 1994 and was not with the other union applicants on February 1, 1994.

On April 19, 1994 one union pipefitter, Donald Broussard, and five union laborers applied for jobs. The laborers were as follows:

1. Randy Strothers
2. Coleman Fee
3. Memphis Johnson
4. Johnny Durant
5. Jerry Elkins

I will dismiss the allegations regarding these six discriminatees. The five union laborers

all applied for the position of rebar helper which was posted. However, Respondent did not in fact hire any rebar helpers for this project after April 15, 1994 although Respondent did sometime later transfer two utility workers from utility worker to rebar helper positions. Supervisor Ed Strickland testified that the rebar work was properly accomplished. With respect to Donald Broussard I note that he is a young man whose application reflected no work at all in his trade for the past two years preceding his application. Based on his application Brossard does not appear qualified and Respondent's failure to hire him is not a violation of the Act..

On May 10, 1994 four union pipefitters applied for work for Respondent. They were as follows:

1. Steven LeBlanc
2. Terry Quatrevinght
3. Mike Wooten
4. Jeff Armstrong

These men applied because Jeff Armstrong had learned that Respondent was testing for pipefitters and he and the others went to Respondent's office to be tested as pipefitters and apply for work. They were not allowed to apply and were told that only former employees of Respondent could be tested.

In late August 1994 Respondent was advertising for electricians. On August 29 two union electricians, Kelly Browning and Mike Clary, applied and on August 30, 1994 union electrician Danny Aucoin applied. None of these highly qualified men were hired.

The record is clear that the union affiliated applicants for employment applied for work and were qualified in their craft with the exception of Broussard who well may be qualified but whose application was deficient. Further, that these applicants were not hired. Still further, that Respondent did hire employees for the positions these applicants applied for with the exception of the rebar helper position and because of massive evidence of anti-union animus the only logical conclusion is that these applicants were denied hire because of their membership in the union. Having heard the testimony of most of these discriminatees and seen their applications and the applications of those who did not testify and all the other witnesses it is obvious that these union affiliated applicants were bona fide applicants for employment. See, *Town & Country Electric, Inc.*, supra.

The evidence of anti-union animus on Respondent's part with respect to the Exxon project in Baton Rouge is as follows:

1. HR 132 is a written human resources policy document of Respondent. It is, at a minimum, a nationwide policy. It provides that applications will remain active for 60 days and any exception to the policy must be approved by Respondent's Vice President for Human Resources. HR 132 also contains a provision that there will be a hiring preference for Fluor Daniel certified craftsmen. It does not provide for a preference for applicants with experience with Respondent but who are not certified. Suffice it to say the following memo was sent on December 1, 1993 from Ed Martinez of Industrial Relations to Bill Austin about the staffing procedures of Respondent at the Exxon project. Copies of this memo were sent to Dave

Harris who became project manager at the Exxon project. Bill Austin was the human resources manager at the Exxon project and in charge of hiring.

The memo stated:

> "In order to meet our staffing goals with qualified craft employees, and protect ourselves from unfair labor practice charges, the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan requires that preferential hiring be given to applicants in the following order:
>
> 1) Fluor Daniel Certified
> 2) Fluor Daniel Experienced
> 3) Others
>
> The following recommendations are also made in an effort to further diminish the potential for the filing of any ULP charges:
>
> - Accept job applications only when jobs are available and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.
> - It is recommended that applications be individually numbered and remain valid for 30 days.
> - Human Resources must be prepared to justify why one person was hired over another, particularly for non-Fluor Daniel experienced employees.
> - Should anyone attempt to "drop off" applications in bulk, they must not be accepted. Applications "left on the counter" should immediately be put in an envelope and mailed back to the person or organization which left them. They should be notified as to the proper procedure for submitting an application. If at all possible, have a witness present to view the action taken."

It is obvious that this memo from Industrial Relations to staffing was the game plan to discriminate in hiring against union affiliated applicants and get away with it. If there was a law that prohibited discrimination in employment against veterans of the Vietnam War, Martinez' memo would read as follows:

> "In order to meet our staffing goals with qualified craft employees, and protect ourselves from charges that we discriminate against Vietnam veterans the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan requires that preferential hiring be given to applicants in the following order:
>
> 1) Fluor Daniel Certified
> 2) Fluor Daniel Experienced
> 3) Others

The following recommendations are also made in an effort to further diminish the potential for the filing of any charge that we discriminate against Vietnam veterans:

- Accept job applications only when jobs are available and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.
- It is recommended that applications be individually numbered and remain valid for 30 days.
- Human Resources must be prepared to justify why one person was hired over another, particularly for non-Fluor Daniel experienced employees.
- Should anyone attempt to "drop off" applications in bulk, they must not be accepted. Applications "left on the counter" should immediately be put in an envelope and mailed back to the person or organization which left them. They should be notified as to the proper procedure for submitting an application. If at all possible, have a witness present to view the action taken."

It is clear that, as modified, Respondent would be manifesting an intent and laying out a plan to discriminate against Vietnam vets and get away with it. It is obvious that the memo is the game plan on how to discriminate in employment against union affiliated applicants for employment and get away with it.

Another aspect of this memo is interesting because it varies from the provisions of HR132 and it is conceded by Respondent that no permission to vary from HR132 was granted and variances were not permitted without permission. It further shows that Respondent, when it wants to vary from policy to discriminate against union applicants simply does so, but if a policy (the 60 day period for active applications for example) assists in discriminating against union applicants that policy will be faithfully adhered to.

2. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, Inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference for someone who has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference for craftsmen who have experience with Fluor Corporation's union counterpart.

3. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for experience with Respondent among craftsmen. Needless to say engineers are generally not organized and craftsmen might be. The rationale for the policy is not to hire people who worked for Respondent in the past and did a good job because then there would be a preference for salaried employees but the rationale for the policy is to keep out unions and if you have to discriminate in hiring against union affiliated applicants for employment to do so then do it.

4. James "Kenny" Bueche (pronounced Bush) was a union boilermaker who applied for an ironworker position on February 1, 1994, a job for which he was qualified. He is a former employee of Respondent and Respondent claims it doesn't have his application. The dilemma facing Respondent since Respondent argues that they are wedded to hiring former employees over non Fluor Daniel applicants is how can they explain their failure to hire Bueche. They can not do so without admitting discrimination so they claim they never got his application. This is powerful evidence of antiunion animus and supports the overall finding that Respondent

discriminated in hiring against union affiliated applicants for employment.

5. In late August 1994 Ed Martinez spoke with Rhonda Glover on the phone. Martinez is from Industrial Relations and was concerned about the unfair labor practice charges pending in Region 15. Glover was the person at that time in charge of craft hiring at the Exxon project.

Martinez told Glover he thought it would help the chances of Region 15 not issuing a complaint if Respondent could demonstrate that it hired some union affiliated applicants.

Shortly thereafter Glover did something she had never done before. Glover called Charles Dame, a young electrician and member of IBEW Local 995 and asked him to come in to the office and expand on his application by listing 42 months experience. Dame was then offered a job and started work on September 6, 1994. Glover also hired Ricky Russell. Interestingly enough when the Respondent thought it might persuade Region 15 to not issue a complaint Respondent found it easy to hire union affiliated applicants but not at any other time.

6. The only applicant that Glover ever asked to expand his application to list 42 months of experience was Dame. Glover testified that she regularly told applicants for journeymen positions to list 42 months experience but with the exception of April 19, 1994 the evidence is that she never told the union applicants they had to list 42 months experience on their applications. She and the other craft recruiter, Terry Wilson Burns, would review the applications submitted by the union applicants before the applicants left Respondent's office and although it was obvious in virtually every case that the applicants applying for journeymen jobs but had listed less than 42 months experience neither Glover nor Burns ever told the applicants they had to list 42 months of experience but simply looked over the application and told the applicant that it looked okay and the applicant left. The applicants would never know that they had no chance whatsoever of being hired because they did not list 42 months experience. Glover and Burns knowingly and deliberately lulled the union applicants into a false sense of security that they had applied for a job and had a chance of getting one whereas their real opportunity for being hired was zero.

7. Respondent, through Ed Martinez's memo, reduced the time for an application being active from 60 days to 30 days. If you read Martinez's memo, spelled out in item 1 above it is obvious that the 60 day active period was reduced to 30 days in order to assist in Respondent's discrimination in employment against union affiliated applicants. This is demonstrated by the fact that many high ranking officials of Respondent could offer no justification whatsoever for the reduction from 60 to 30 days, e.g., David Bordages, Vice President of Human Resources, David Harris, Respondent's project manager for the Exxon Project, Bill Austin, Human Resources Manager at Exxon Project in January 1994 and February 1994, Rhonda Glover, craft recruiter and then Austin's successor as Human Resources Manager at the Exxon project.

The rationale for the 60 day rule, according to Respondent's own witnesses, is that after 60 days most craftsmen will have found other work and no longer be interested in employment. This rationale breaks down in this case because by filing charges and pursuing litigation the applicants showed they were still interested in employment with Respondent.

8. Respondent's treatment of Jeff Armstrong is most telling. Armstrong is a paid union organizer for Pipefitters Local 198. On four occasions he went to Respondent's hiring office in Baton Rouge to apply for work at the Exxon project, i.e., February 1, 1994, April 19, 1994, May 10, 1994, and July 20, 1994. He was rejected for employment all four times.

According to craft recruiter Rhonda Glover, Armstrong was "underqualified" when he

applied for an ironworkers job on February 1, 1994 because he didn't list 42 months of qualifying experience but only 18 months of experience but she accepted his application and never said it was incomplete even though she looked it over.

According to Glover, Armstrong was "overqualified" for the pipefitter helper position Armstrong applied for on April 19, 1994. She claimed she didn't like hiring journeyman for helper positions because they would be unhappy making less pay. Yet she hired many journeymen into helper positions but only if the person had worked for Respondent in the past but couldn't be hired as a journeymen because, for example, they had failed the welding test.

According to Glover when Armstrong applied to take a pipefitter test and be hired as a pipefitter on May 10, 1994 he was told he couldn't take the pipefitter test because it was being given only to former employees of Respondent and not to anyone who had not previously worked for Respondent. He was not "qualified" to take the test because he had not worked previously for Respondent.

According to Glover when Armstrong applied on July 20, 1994 for a job as an instrument helper she didn't hire him because he was "overqualified."

Respondent had posted and was hiring ironworkers on February 1, 1994, pipefitter helpers on April 19, 1994, pipefitters on May 10, 1994 and instrument helpers on July 20, 1994. Armstrong was well qualified for each of these positions but Glover wouldn't give him the time of day. Armstrong, it is clear, never had any chance whatsoever of being hired by Respondent and it was because he was a union affiliated craftsman. This is blatant discrimination.

9. As shown above union electricians and union pipefitters applied for work with Respondent and weren't hired. Their continued interest in being offered employment was manifested by charges filed on their behalf by their unions with Region 15 in New Orleans.

Nevertheless in August and September 1994 Respondent was in such desperate need of electricians and pipefitters and welders that is subcontracted with ISC for electricians, with Harmony for pipefitters, and with JE Merit for pipefitters and welders. Needless to say ISC, Harmony, and JE Merit are all non-union contractors.

10. Respondent claims that it religiously followed its policy of giving hiring priority first to Fluor Daniel certified craftsmen and then to Fluor Daniel experienced craftsmen and while giving preference to applicants for employment makes sense and is legal if done because an employer wants employees who it knows from past experience are good workers the implementation of the policy must be reasonable. All too often it was anything but reasonable and was an excuse to not hire union affiliated applicants, for example, the following Fluor Daniel experienced applicants were hired over union applicants with impeccable records: Ryan Smith (guilty of possession of illegal weapon or alcohol), Claude Honnycutt (who had been fired three times in the past by Respondent for absenteeism), Kim Kitrell (who had been fired by Respondent for absenteeism and for failing a drug test), Claude Fortson (who had been fired twice for absenteeism and once for insubordination), Thomas Blacknon (whose coded entry reflected he had previously been fired by Respondent for endangering the safety of himself or others on the job), Thurmond Almaroad (who had been fired for insubordination), and Robert P. Jones (who had previously been convicted of assault with intent to kill).

11. Respondent was in such dire need of pipefitters, welders, and electricians that it sent out on September 21, 1994,11,000 mailgrams to former employees looking for pipefitters and welders, it sent out on September 30, 1994, 9,218 mailgrams to former employees looking

for pipefitters and on October 7, 1994 it sent out 3,300 mailgrams to former employees looking for electricians.

It cost $.42 each to send out a mailgram and Respondent incurred this cost rather than consider and hire the union affiliated applicants who had applied for work and whose applications Respondent still had in its possession at the job site and who were pressing their job discrimination claims through Region 15 of the Labor Board.

12. Although Glover claimed that she always told journeymen applicants that they had to list 42 months of experience on their applications and since most of the union affiliated applicants did not do so Respondent properly rejected them for employment. However, when confronted with the fact that many applicants who were hired had also not listed 42 months of experience Glover said that former employees of Respondent did not have to list 42 months of experience because the craft recruiter (her or someone else) could check their work experience in Respondent's computer by typing in the applicant's name and social security number. There is, I note, nothing on the application that provides you must list 42 months of experience if applying for a journeyman position.

13. Although Glover claimed she told all applicants of the 42 months rule many discriminatees credibly testified that they were never told they had to list 42 months experience, e.g., A. E. Ross, Kelly Browning, C.A. Lewis, Richard Fletcher, David Greer, William Blalock, Curtis Blount, John Kelly, Kelly Gauthereaux, Danny Aucoin, Ricky Achord, Jeff Burns, Ernest Green, Edwin Cook, Eugene Braund, Ricky Russell, Don Guarino and Joe Aycock.

There was space on the application form for information about six prior jobs and although the form states that all prior employment should be listed and continuation sheets can be used continuation sheets were not routinely made available and people weren't told that they were available if any event.

In the construction business employees go from job to job and, as A. E. Ross testified, if he listed every job his application would be size of a telephone book.

The fact is these applicants were looking for work and had 42 months of experience, and would have and could have listed 42 months if they had been told that they would not be considered for employment if they had not listed 42 months of experience.

14. The experience of Charles Dame is also most telling. Dame engaged in concerted protected activity in complaining about a noxious gas emission and the lack of scaffolding on the job site.

On October 6, 1994 electrical foreman Doug Robinson told Dame to "quit fucking up." The only parties to this encounter were Dame and Robinson. Robinson denied he ever said this to Dame. I credit Dame. If Dame wanted to lie why not select a higher official of Respondent then a first line foreman. Robinson still works for Respondent and was not about to admit he said something that may hurt Respondent's case. This implied threat is a violation of Section 8(a)(1) of the Act.

15. A few days later Dame went on strike against Respondent claiming it was a unfair labor practice strike because of Respondent's failure to hire union affiliated applicants for employment.

At the time he went on strike Dame was hired by another contractor, J. E. Merit, which

contractor was also working at the Exxon refinery.

All employees who worked at the Exxon project wore badges issued by Exxon security. Exxon had a rule that employees could not be badged to more than one contractor. The basis for this rule was safety and accountability. If there was a major accident at the site Exxon wanted a good handle on who was on site. An employee could only have one security badge.

When Dame wanted to get a security badge to go on site to work for JE Merit he was told by Exxon security that he could not be issued a badge to get on site to work for J.E. Merit until Respondent turned in the security badge issued Dame as a result of his employment with Respondent. Respondent, claiming Dame was still their employee but on strike, refused to release Dame's security badge to Exxon and Exxon would not issue a new security badge to Dame and as a result Dame could not go to work for J.E. Merit.

Needless to say Respondent could have easily released Dame's security badge to Exxon security and kept Dame on their rolls as an employee. Their failure to do is evidence of union animus as well as a separate violation of Section 8(a)(1) and (3) of the Act.

16. Ricky Russell was hired in late August 1994. Russell is a union business agent for IBEW Local 995. After he was hired Russell tried to organize the employees and was told, at one point, by supervisor James Laws that he was being disciplined or was going to be disciplined for union solicitation during what Laws claimed was work time but what Russell said was break time. In any event Russell was not disciplined and I find no violation of the Act.

Michael Albritton, an employee of Respondent, testified that after Russell was hired he had a conversation with his foreman Clint Bamber. Albritton testified as follows:

> "A Mr. Bamber came in and he said he had something to tell us. He said it could get him in a lot of trouble if he told us, but that he felt like we had a right to know who we was working with. And he went on to tell us that he could get in trouble and all for it.
>
> Q Did he explain what it was that --
>
> A He told us that Ricky Russell had hired in, and during orientation that he had stood up and told everybody he was organizing for the union and passed out union literature. And he said the hiring office must not know what they doing because Ricky Russell was the B.A. in Baton Rouge.
>
> Q Did you say anything to him -- or to Mr. Bamber at that time?
>
> A We was just listening to him mainly because, you know, he was telling us, I guess, in confidence.
>
> Q Do you know what a B.A. is?
>
> A I didn't at that time.
>
> Q And when did you learn what a B.A. was?
>
> A I asked him what a B.A. was, and --

Q Well, who is him?

A Clint Bamber.

Q Okay.

A And he told me that he was a head man for the union.

Q And was this during your conversation with regards to Ricky Russell that evening in the motor control room?

A It was.

Q After he explained to you what a B.A. was do you recall him saying anything else? Let me withdraw that question. Did Mr. Russell work on your crew?

A No, he didn't.

Q Do you know whose crew he worked on?

A He was -- Clint was he -- Mr. Bamber said he wanted to get him in our crew, but they had -- so he could get rid of him. But they had already placed him in Marshall's -- Martin's crew.

Q Who is Martin?

A Martin was another electrical foreman on the job."

Remedy

The remedy in this case should include a cease and desist order, the posting of an appropriate notice, the offering of positions to those applicants unlawfully refused hire because of their union affiliation and a make whole remedy for lost wages and benefits.

With respect to Palo Verde if Respondent still has the service and maintenance contract with Arizona Public Service those discriminatees (all of whom with the exception of Gary Evenson worked at Palo Verde for Bechtel Corporation) can be offered employment there.

With respect to the Exxon project I note that the building of the East Coker plant is completed. Respondent, however, moves from project to project and those applicants for employment unlawfully denied employment at the Exxon project can be offered jobs at other current projects of Respondent.

Those discriminatees who were unlawfully denied employment as journeymen at either Palo Verde or Exxon should be permitted to be tested to be certified by Respondent in the craft for which they were unlawfully denied employment.

I will not disturb Respondent's hiring preference for Fluor Daniel certified or experienced applicants but it is to be used in the future only in a lawful manner. With respect to the 60 day period for applications remaining active at Palo Verde and the 30 day period for applications remaining active at Exxon these rules should not be used to discriminate. In law school one

learns the concept that "the law abhors a vain act" and to require these applicants to have reapplied every 60 or 30 days when there were openings would be to ask them to engage in vain acts because Respondent had no intention of hiring them because of their union affiliation.

It should be noted that Respondent's practice was to keep all applications for employment for one year and only them to send the applications to storage. The applications were never destroyed.

The Board in *Hickmott Foods*, 242 NLRB 1357 (1979) held that a broad cease and desist order requiring a Respondent to cease and desist from "in any other manner" rather than the narrow "in this or any like manner" language should be reserved for situations where a Respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

In light of the violations of the Act I find herein and bearing in mind prior litigation involving this same Respondent, i.e., *Fluor Daniel I,* supra, and *Fluor Daniel II,* supra, I will recommend a broad cease and desist order because of Respondent's demonstrated proclivity to violate the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The three charging party unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when its foreman Harry Sinclair at the Palo Verde project told an employee that applicants who write voluntary union organizer on their applications would not be hired.

4. Respondent violated Section 8(a)(1) of the Act when its foreman Doug Robinson at the Exxon project threatened an employee with unspecified reprisals for concertedly complaining about safety and health issues on the project.

5. Respondent violated Section 8(a)(1) and (3) of the Act when its supervisors and agents refused to release Charles Dame's security badge thereby preventing him from working

for another contractor on the Exxon project after Dame had gone on strike against Respondent.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to offer positions to any of discriminatees listed below in paragraph 2 of my recommended Order because of their union affiliation.

7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Based on these findings of fact and conclusions of law and pursuant to Section 10(c) of the Act I hereby issue the following recommended:

ORDER[4]

The Respondent, Fluor Daniel, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Restraining or coercing employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.

(b) Threatening employees with unspecified reprisals because they engage in protected concerted activity.

(c) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

(d) In any other manner interfering with, restraining, or coercing its employees or applicants for employment in the exercise of their Section 7 rights protected by the Act.

2. Take the following affirmative action deemed necessary to effectuate the purposes and policies of the Act:

(a) Within 14 days from the dates of this Order offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rule, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Palo Verde (Applicants who filed applications in June 1994)

Boilermakers
John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey
Robert Logue
Don Mourney
Rudy Pariga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voorhes
Ernie Wilden

Electricians
John Starkel

Insulators
Michael Bradley
Ed Martinez
Frank Naccarato

Millwrights
Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn
Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael Swarthout
Frank Troester
Michael Valdez
Richardo Valdez

Ironworkers
Tony Allen, Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Palo Verde (Applicants denied opportunity to file applications on June 27, 1994)

Insulators
James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Carpenters
Francis Chaney
Don Shoemaker
Johnny Tyler, Jr.

Sprinkler Filler
John Rahn

Ironworkers
Linda Hayes
Steven Padilla
Ron Richards

Painters
Julio Garcia
Greg Stroud

Cement Masons
Waymond Parker
Charles Walsh

Boilermakers
Michael Goodman
Mike Leslie
Joseph Wood

Millwrights
Clyde Hafeli
Ken Hayes

Palo Verde (Applicant first told in August 1995 Respondent needs welder and then told, after he say he is union and wants to organize, that Respondent does not need welders that time)

Boilermaker
Mark Winham

Exxon Project

Electricians
Danny Aucoin
Ricky Achord
Joe Aycock
Chris Bonnette
Kelly Browning
Jeff Bourg
Curtis Blount
Edwin Cooks
Mike Clary
Richard Fletcher
Kelly Guathreaux
Wallace Roland Goetzman
Don Guarino
Mike James
Earl Long
Robert LeJeune
Leon Parent
Ronnie Perry
Ernest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell

Pipefitters
Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud
Jeffrey Burns
Earnest Ford
Jeff Mire
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers
James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
JJ Leveron
CA Lewis
Robert H. Redden
AE Ross

(b) Make the individuals listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them and make Charles Dame whole for any loss of pay and other benefits suffered by him as a result of Respondent's refusal to release his security badge to Exxon. Backpay to be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of

backpay due under the terms of this Order.

(d) Within 14 days after service by the Region post at all its job sites within 75 miles of the Palo Verde Nuclear Generating Station in Arizona and at all its job sites within 75 miles of the Exxon project in Baton Rouge, Louisiana copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15 or 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 15 or 28 sworn certifications of a responsible official on a form provided by Regions 15 or 28 attesting to the steps that the Respondent has taken to comply.[6]

Dated, Washington, D.C. February 6, 1998.

_____
Martin J. Linsky
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[6] The unopposed motions to correct transcript are granted.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coerce employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.

WE WILL NOT threaten employees with unspecified reprisals because they engage in protected concerted activity.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

WE WILL NOT in any other manner interfere with, restain, or coerce our employees or applicants for employment in the exercise of their Section 7 rights protected by the Act.

WE WILL offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

Palo Verde

Boilermakers
John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey

Millwrights
Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn

Robert Logue
Don Mourney
Rudy Pariga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voorhes
Ernie Wilden

Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael Swarthout
Frank Troester
Michael Valdez
Richardo Valdez

Electricians
John Starkel

Ironworkers
Tony Allen, Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Insulators
Michael Bradley
Ed Martinez
Frank Naccarato

Palo Verde

Insulators
James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Carpenters
Francis Chaney
Don Shoemaker
Johnny Tyler, Jr.

Sprinkler Fitter
John Rahn

Ironworkers
Linda Hayes
Steven Padilla
Ron Richards

Painters
Julio Garcia
Greg Stroud

Cement Masons
Waymond Parker
Charles Walsh

Boilermakers
Michael Goodman
Mike Leslie
Joseph Wood

Millwrights
Clyde Hafeli
Ken Hayes

Palo Verde

Boilermaker
Mark Winham

Exxon Project

Electricians
Danny Aucoin
Ricky Achord
Joe Aycock
Chris Bonnette
Kelly Browning
Jeff Bourg
Curtis Blount
Edwin Cooks
Mike Clary
Richard Fletcher
Kelly Guathreaux
Wallace Roland Goetzman
Don Guarino
Mike James
Earl Long
Robert LeJeune
Leon Parent
Ronnie Perry
Ernest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell

Pipefitters
Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud
Jeffrey Burns
Earnest Ford
Jeff Mire
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers
James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
JJ Leveron
CA Lewis
Robert H. Redden
AE Ross

WE WILL make the above listed applicants whole for any loss of pay and other benefits, with interest, and make whole Charles Dame for loss of pay and other benefits as a result of our unlawful refusal to release his security badge, with interest.

FLUOR DANIEL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 15, 1515 Poydras Street, Room 610, New Orleans, Louisiana 70112–3723, Telephone 504–589–6389 or the Board's Office, Region 28, 234 North Central Avenue, Suite 440, Phoenix, Arizona 85004–2212, Telephone 602–379–3188.